Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1993

MIDWEST PRIDE V, INC.;
MICHAEL F. MORAN; MICHELE MORAN;
FRANK E. FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. RICHARD G. WARD,

Respondent.

Petition For Writ Of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May this Court's holding in Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), that the First and Fourteenth Amendments are neither offended nor implicated by the use of a state nuisance law to padlock a bookstore because of prostitution and other misconduct occurring on the premises, but having nothing to do with the store's book-selling activities, be extended to a situation where a bookstore and video arcade are padlocked under a state nuisance law based on inappropriate (but not criminal) conduct of some of the store's patrons occurring in response to and while viewing videotapes protected by the First Amendment in the arcade area of the store?

II. Is such a statutory scheme unconstitutional as applied under the First and Fourteenth Amendments for failing that part of the test set forth in United States v.

O'Brien, 391 U.S. 367 (1968), which requires employment of the remedy in furtherance of the law's goals that is least restrictive of First Amendment freedoms?

LIST OF PARTIES

The parties to the proceeding in the Ohio Supreme Court were Midwest Pride V, Inc.; Michael F. Moran; Michele Moran; Frank E. Findo and Real Property as appellants, and the State of Ohio ex rel. Richard G. Ward as appellee.

There are no parent or subsidiary companies of Midwest Pride, V, Inc.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MIDWEST PRIDE V, INC.;
MICHAEL F. MORAN; MICHELE MORAN;
and FRANK E. FINDO

Petitioners,

vs.

STATE OF OHIO, EX REL. RICHARD G. WARD,

Respondent.

Petition For Writ of Certiorari To
The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

Midwest Pride V, Inc.; Michael F. Moran; Michele Moran and Frank E. Findo, petitioners, pray that a writ of certiorari issue to review the judgment of the Ohio Supreme Court entered in this case on October 20, 1993.

OPINIONS BELOW

The order of the Ohio Supreme Court dismissing the appeal for the reason that no substantial constitutional question exists is set forth at 1a. The opinion and judgment entry of the Court of Appeals for Ross County, Ohio, Fourth Appellate District is set forth at 3a. The Amended Judgment Entry and Judgment Entry of the Court of Common Pleas of Ross County, Ohio are set forth at 42a and 46a, respectively. Other judgment entries and orders of the Court of Common Pleas of Ross County, Ohio are set forth at 50a, 54a and 63a.

JURISDICTION

The opinion and judgment of the Court of Common Pleas of Ross County, Ohio were entered on April 14 and 16, 1992. 42a; 46a. The opinion and judgment of the Court of Appeals for Ross County, Ohio was entered

on June 4, 1993. 3a. The judgment of the Ohio Supreme Court was entered on October 20, 1993. 1a. This Court has jurisdiction to review the judgment rendered by the highest court of a state by writ of certiorari, pursuant to 28 U.S.C. § 1257, where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution and the Ohio Public Nuisance Statutes, Chapter 3767 et seq. and its predecessors, are reprinted in the Appendix to this petition at 67a through 95a.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to determine how far the principles enunciated in Arcara v. Cloud Books, 478 U.S. 697 (1986) should be extended. In Arcara, the Court reviewed a New York Court of Appeal's decision which had held that New York's public nuisance statute could not be constitutionally applied to close down an adult bookstore.

In Arcara, the activity precipitating the application of the nuisance statute included repeated instances of criminal misconduct such as the solicitation of prostitution. The State initiated a nuisance action which sought the full panoply of available statutory remedies, including temporary and permanent injunctions, complete closure for one year, and forfeiture and sale of all of the personal property and contents of the store that were used to

maintain and conduct the nuisance. The trial court rejected the bookstore's argument that the First Amendment prevented application of the statute's closure remedies and the appellate division affirmed.

The New York Court of Appeals analyzed the application of the statute to the bookstore under the First Amendment principles set forth in United States v. O'Brien, 391 U.S. 367 (1968). Applying those principles, the court found that while the goals, means and purpose of the nuisance statute were constitutionally permissible, the closure remedy could not be constitutionally applied to the adult bookstore because the remedy was much broader than was necessary to achieve the statute's goals. It went on to find that other, less restrictive alternatives, that would not unduly inhibit the store's book selling activities, were available for achieving the statute's goals

of preventing illicit commercial sexual activity. See 478 U.S. at 701-02.

This Court reversed the New York Court of Appeals decision. In doing so, this Court did not question the conclusion reached after applying the O'Brien analysis, but rather, found O'Brien was not applicable. In reaching this conclusion, the Court noted that O'Brien was applicable only to those situations where the conduct being regulated was inextricably intertwined with speech. 478 U.S. at 703-04. It gave as examples the circumstances presented by O'Brien itself, which involved the prosecution of the petitioner after he burned his draft card in an attempt to convey a message protesting the draft, as well as those presented by Clark v. Community for Creative Non-Violence, 486 U.S. 288 (1984)(petitioner prosecuted for sleeping in public park to protest the plight of the

homeless), and United States v. Albertini, 472 U.S. 675 (1985) (barring protester from entering military base), among others. It then reviewed the conduct presented by Arcara and determined that such conduct was not speech and was not conduct intermingled with speech. Rather, it found the occurrence of criminal misconduct having nothing to do with speech. 478 U.S. at 706-07. The Court then held O'Brien was not applicable because

> [t]he legislation providing the closure sanction was directed at unlawful conduct having nothing to do with books or other expressive activity. Book selling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises.

478 U.S. at 707.

This case raises the question whether the First Amendment requires strict scrutiny, in accordance with the four-part a-

nalysis set forth in United States v. O'Brien, 391 U.S. 367 (1968), of a state nuisance statute's application to an adult bookstore and arcade that disseminates constitutionally protected expression, where the conduct precipitating the application of the statute was inextricably intertwined with the constitutionally protected expression being disseminated therein, and where the one year closure and forfeiture remedies mandated by the statute impose a restriction on First Amendment freedoms far greater than is essential to the furtherance of the statute's goals. Simply put, this case questions the limits of the Arcara principles in situations where speech plus conduct are intertwined.

This is one of a growing number of cases in which the State of Ohio, in reliance upon this Court's decision in Arcara v. Cloud Books, has applied its Public Nui-

sance Statute[1] to completely shut down adult bookstores on the ground that "lewdness" has occurred on the premises. Petitioners herein contend the holding of Arcara should not be extended to a situation where the nuisance statute is applied to close down an adult establishment in which, in response to viewing protected expression, patrons have engaged in noncriminal sexual misconduct such as masturbation, within the closed doors of video viewing booths.

Review of the constitutionality of the application of Ohio's Public Nuisance Act under these and similar circumstances presents this Court with an opportunity to illuminate the analysis appropriate to this confused, conflicting and reoccurring is-

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[1] Ohio's statute, which is reprinted in the Appendix attached hereto, can find its clone in at least 19 other jurisdictions.

sue. Similar cases are being filed all over the country, and the urgency of the need for direction from this Court draws intensity from the fact that concededly protected expression has been and continues to be completely suppressed under the guise of utilizing Arcara to apply nuisance statutes to close down adult entertainment establishments absent analysis under the First Amendment.

In this case, the prosecutor of Ross County filed a nuisance action on November 27, 1991, which sought closure of the Lions Den, an adult bookstore and arcade, on the ground that lewdness was occurring on the premises.

The Lions Den is a retail bookstore with a separate video arcade area that is operated as a private club. Adult videos, films, books, magazines and novelties were available for purchase in the retail area

of the store. Members could enter the video arcade by travelling through a large doorway off of the retail area of the store. The video arcade was comprised of private viewing booths, preview booths and several pinball and vending machines. Each private viewing booth contained a door with a lock, a seat for one patron, a menu of sexually oriented videos available for viewing, a device for selecting the video to be viewed and coin-activated viewing equipment which allowed a member to view a segment of a video for each quarter deposited.[2]

The nuisance abatement action followed an investigation launched by the respondent to ascertain whether sexual activity was occurring on the premises. However, no

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[2] The preview booths were similar to the private viewing booths, but were not coin-activated.

criminal or any other kind of complaint of on-site sexual activity had ever been lodged against the Lions Den or its patrons. Similarly, none of the materials being disseminated by the Lions Den were alleged to be obscene.

During the eleven month investigation, government agents repeatedly entered the Lions Den video arcade area for the purpose of gathering evidence of inappropriate sexual activity. Specifically, they entered the booths and collected evidence they believed would help them demonstrate the presence of semen within the confines of various video viewing booths, and by photographing and surreptitiously videotaping the premises and its patrons. In addition, after gaining entry into the arcade area of the store, the agents, who had discovered holes in two of the walls separating sever-

al of the viewing booths[3], repeatedly entered one of the several booths containing a hole and spied through the hole at unsuspecting patrons in the adjoining booth. On several occasions, agents peering through the holes were able to see unsuspecting patrons engaged in masturbation or other inappropriate, yet noncriminal, sexual activity within the confines of the enclosed video viewing booths.

Based on this evidence, the respondent filed a complaint against petitioners in the Common Pleas Court, Ross County, Ohio, which alleged the Lions Den was a nuisance subject to abatement pursuant to Chapter 3767 of the Ohio Revised Code on the ground that it was a place where lewdness occurred. Pursuant to § 3767.04 of the Ohio

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[3] The holes between the booths had been repaired as of the time the trial court ruled on the prosecutor's motion for a permanent injunction.

Revised Code, the trial court issued an ex parte restraining order which prohibited the petitioners from removing or in any manner interfering with the personal property and contents located within the premises, see Restraining Order, 63a-66a, and set the matter for a temporary injunction hearing within ten days of the filing of the complaint.

Petitioners were served with the complaints, restraining orders and various other documents just days before the temporary injunction hearing was held. At the temporary injunction hearing and at every conceivable opportunity thereafter, the petitioners raised a number of objections to the complaints and the proeedings in general, both constitutional and otherwise, including that as applied to petitioners, Ohio's public nuisance statute is unconstitutional. Specifically, petitioners

claimed there and claim now that the First Amendment is applicable to a situation such as this because, unlike the situation in Arcara v. Cloud Books, the conduct herein at issue occurred while patrons were in the process of viewing constitutionally protected expression, and therefore was inextricably intertwined with expression protected by the First Amendment. Moreover, the petitioners also argued that even if a nuisance was found to exist, the First Amendment required the court to tailor its application of the statutory remedies such that they were the least intrusive on petitioners' continued dissemination of protected expression.

Relying on Arcara v. Cloud Books and the Ohio Supreme Court's decision in State ex rel. Miller v. Rear Door Bookstore, 63 Ohio St.3d 354, 588 N.E.2d 116 (1992), the trial court rejected petitioners' arguments, re-

fused to employ a First Amendment analysis and, after hearing the evidence, granted most of respondent's requests for relief. Specifically, and pursuant to Ohio Rev. Code § 3767.04, the trial court issued a temporary injunction on February 21, 1992 which ordered closure of the entire premises for all purposes. See Journal Entry at 54a-62a. Thereafter, the trial court issued a final judgment on April 14 (as amended April 16, 1992), which declared the entire Lions Den a nuisance, and, pursuant to Ohio Rev. Code § 3767.06, ordered a permanent injunction abating said nuisance, and ordered the entire premises closed for one year. See Amended Judgment Entry at 42a-45a.

Although the trial court refused to apply a First Amendment analysis to test the application of the nuisance statute to petitioners, the trial court went on to

find, in any event, that closing the entire premises for one year was "the least restrictive remedy available" to prevent lewdness from occurring within the video booths located in the arcade portion of the store. See Amended Judgment Entry at 44a.

Petitioners appealed the trial court's judgment to the Court of Appeals for Ross County. Petitioners raised five separate assignments of error in the court of appeals, including that the trial court erred in failing to find the nuisance statute, as applied to these petitioners, violated the First Amendment to the United States Constitution. See Decision and Judgment Entry of Court of Appeals, 3a-5a.

Relying on Arcara v. Cloud Books, the appellate court, with one judge dissenting in part, affirmed the trial court's judgment, holding the First Amendment did not apply to the circumstances of this case.

The appellate court went on to find, however, relying on the Ohio Supreme Court decision in State ex rel. Miller v. Rear Door Bookstore, that even if the First Amendment was applicable, it would find no error because there was "competent, credible evidence to support the trial court's finding" that closing the entire premises for an entire year was the least restrictive alternative available to alleviate the misbehavior engaged in by the store's patrons. See Decision and Judgment Entry at 12a-15a.

The dissenting judge disagreed with the propriety of closing the entire premises because "the relief was overly broad and far beyond what was needed to abate the nuisance." See Opinion by Grey, J., concurring in Part and Dissenting in Part at 35a. Moreover, Judge Grey went on to state that:

In this case, according to the testimony of the police officers, there was a bookstore sales area which was connected to the viewing booth area. Entrance to the booth area was through an opening described by the officer as a large doorway.... In the case here, the nuisance could have been eliminated by simply ordering that the booths be torn out and the doorway opening to that area be sealed off. Closing the bookstore was excessive and far beyond what was needed to eliminate the nuisance.

The use of nuisance laws to suppress constitutionally protected activity is a particularly dangerous kind of activity. I can imagine a religious bookstore with a back room where the patrons pray and burn candles and where the burning of the candles is considered to be a fire hazard. Clearly, the hazardous conduct could be enjoined, but to shut down the entire religious bookstore operation would be excessive when the problem could be eliminated by closing off the back room.

I am well aware that many people draw a distinction between the desirability of dirty bookstores and religious bookstores, but it is a distinction without a difference. If we live in a society where the government has the power to suppress one kind of bookstore, it has the power to suppress any kind of bookstore.

> This is not a theoretical, academic observation. I see a tendency to suppress legitimate expression and exercise of religious beliefs along with the suppression of erotic expression and sexual practices. They are two sides of the same coin, and I would hold that, constitutionally speaking, it is a counterfeit coin which should not be circulated in our society.

Id. at 36a-39a.

Petitioners requested the Ohio Supreme Court to hear a further appeal, however, on October 20, 1993, that court declined to exercise its jurisdiction. 1a.

ARGUMENT

REASONS FOR GRANTING THE WRIT

This case presents this Court with an opportunity to address a question left open by Arcara v. Cloud Books. Specifically, petitioners ask this Court to decide whether a First Amendment analysis must be utilized to determine whether a state regulation can be constitutionally applied to completely

close down a bookstore, comprised of two separate and identifiable areas, where unidentified patrons, in response to viewing constitutionally protected expression, engaged in masturbation within the privacy of video viewing booths located in the video arcade area of the store.

The question presented here is unlike that addressed in Arcara v. Cloud Books because here, unlike Arcara, the offensive conduct, i.e., masturbation by unidentified bookstore patrons within the confines of the video viewing booths, was not criminal conduct and did not occur in public, but "was intimately related to expressive conduct protected under the First Amendment." Arcara, 478 U.S. at 707 n.3, 106 S.Ct. at 3177 n.3 (emphasis added) (citations omitted). Moreover, the conduct here, as noted by Justice Blackmun in his Arcara dissent, was "spurred by the [videotapes being

viewed] by browsing customers." Arcara, 478 U.S. at 711 n.*, 106 S.Ct. at 3172, 3179 n.* (emphasis added)(Blackmun, J. dissenting).

In Arcara v. Cloud Books, 478 U.S. 697 (1986), this Court addressed whether the First Amendment was offended by application of a New York statute authorizing closure of a building for being a public health nuisance, to an adult bookstore where criminal activity such as prostitution and other public, sexual conduct between patrons was occurring. 478 U.S. at 699. This Court held the First Amendment was not applicable because the nuisance statute "was directed at unlawful conduct having nothing to do with books or other expressive activity" found within the store. Id. at 706. Rather, the underlying conduct which served as the basis for the closure order--namely, prostitution--had absolutely

no relation to or connection with the bookstore's expressive activity. Id. at 699. Thus, application of the statute to the bookstore was constitutional since closure was necessary to prevent prostitution, a criminal act which neither raised nor implicated expression protected by the First Amendment. Id. at 707. Arcara thus stands for the proposition that a regulation aimed at and applied to conduct having nothing to do with speech, does not implicate the First Amendment and may be utilized to close down a place where expressive activity occurs. See also Alexander v. United States, ___ U.S. ___, 113 S.Ct. 2766, 2774-75 (1993).

In Arcara, however, this Court acknowledged that United States v. O'Brien, 391 U.S. 367 (1968), continues to stand as controlling authority for the level of scrutiny to which a governmental regulation of

conduct must be subjected when the regulation has the incidental effect of burdening protected expression if "the 'nonspeech' which drew [the] sanction was intimately related to expressive conduct protected under the First Amendment." Arcara, 478 U.S. at 707 n.3, 106 S.Ct. at 3177 n.3 (citation omitted) (citing Grayned v. City of Rockford, 408 U.S. 104 (1972); Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940)). See also Alexander v. United States, ___ U.S. ___, 113 S.Ct. at 2775.

In O'Brien, the defendant was charged with burning his draft card pursuant to a statute which did not, on its face, implicate expressive activity. This Court noted, however, that O'Brien burned his draft card in an attempt to convey a message protesting the draft. 391 U.S. at 369-70. Thus, the Court recognized that the defendant had

engaged in a form of criminal conduct that was inextricably intertwined with constitutionally protected expression, and because of the intermingling, ruled that the statute's application to O'Brien would have to be subjected to strict scrutiny to determine whether it was the least restrictive alternative to achieving the statute's goals. 391 U.S. at 376-77.

In O'Brien, this Court held the statute could be constitutionally applied to the defendant. In reaching this conclusion, however, this Court determined that a governmental regulation affecting conduct not necessarily possessing an expressive element but which occurs in combination with protected expression, must be strictly scrutinized to assure it is narrowly tailored so that any incidental restriction on First Amendment freedoms is "no greater than is essential to the furtherance of

[the regulation's goal]." Id. at 377. Thus, O'Brien continues to stand for the proposition that a First Amendment analysis must be utilized to test the application of a statutory scheme, which on its face is designed to regulate conduct not protected by the First Amendment, to conduct completely entangled with expressive activity protected by the First Amendment, and for the further proposition that the statutory scheme must be struck down as an unconstitutional infringement upon First Amendment rights if its application results in the imposition of sanctions unduly restricting and inhibiting the expressive activity. See also Alexander v. United States, ___ U.S. ___, 113 S.Ct. at 2775; Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); United States v. Albertini, 472 U.S. 675 (1985); Barnes v. Glen Theater,

Inc., _____ U.S. _____, 111 S. Ct. 2456 (1991).

The Court cited several examples of situations where O'Brien was appropriately applied. For instance, in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), the Court applied the O'Brien analysis to determine the constitutionality of a ban on camping in a public park to demonstrators who sought to sleep there as a protest of the plight of the homeless. 478 U.S. at 704. In United States v. Albertini, 472 U.S. 675 (1985), O'Brien was utilized to test the constitutionality of a protestor's conviction for trespassing on the grounds of a military base from which he had been barred as a result of previous improper conduct. 478 U.S. at 704. In each of those cases, the Court applied the O'Brien analysis but upheld the constitutionality of the statute since all four

parts of the O'Brien test had been satisfied.

In explaining these decisions, the Court noted:

> we have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in O'Brien, or where a statute based on nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in Minneapolis Star.

478 U.S. at 706-07. See also Alexander, ___ U.S. ___, 113 S.Ct. at 2775.

This case presents the Court with the situation, referred to in Arcara, where the nonspeech conduct which drew the statutory sanction, is intimately associated with the protected speech being disseminated within the bookstore. Absent the dissemination of constitutionally protected expression, the nonspeech conduct would not have occurred.

Here the conduct at issue occurred while patrons were viewing sexually explicit expression within the confines of video booths. The conduct was not of a criminal nature, did not occur in the open, and in fact was only discovered when investigators spied on unsuspecting patrons through holes found between some of the arcade's many booths. Thus, the conduct here was not akin to that involved in Arcara, but rather, was similar to that presented in O'Brien. Here, the conduct occurred in response to patrons' viewing sexually explicit videotapes protected by the First Amendment. Simply put, without the dissemination of constitutionally protected expression, the conduct sought to be averted simply would not have existed. Thus, unlike Arcara, First Amendment activity is implicated in the case at bar, and in fact,

is "intimately connected to the behavior the law enjoined."

Because of this, petitioners contend the courts below were required to analyze the application of Ohio's nuisance statute to this case under the appropriate First Amendment standard of review set forth in O'Brien. Petitioners further contend that a First Amendment analysis of the statute would result in the conclusion that the statute is unconstitutional as applied because the closure remedy mandated by the statute is not the least restrictive alternative available to achieve the statute's goals. Rather, the sanctions mandated by this statute impose an undue restriction on protected First Amendment freedoms.

Both of the lower courts rejected the First Amendment analysis sought by petitioners but went on gratuitously to find

that ordering an injunction and closure of the entire bookstore was the least restrictive remedy for preventing future patron misconduct. The lower courts' findings, however, are patently indefensible for, as was suggested by Judge Grey's concurring and dissenting opinion, "the nuisance could have been eliminated by simply ordering that the booths be torn out and the doorway opening to that area be sealed off. Closing the bookstore was excessive and far beyond what was needed to eliminate the nuisance." See Concurring and Dissenting Opinion of Judge Grey at 37a.

Other cities and, indeed, other states that have dealt with the kind of patron misconduct at issue here have had no trouble creating alternative avenues for ridding their communities of inappropriate sexual misconduct in video booths. In fact, many communities have passed, and the

courts have upheld, what is known as an "open booth" ordinance, which generally requires removal of the doors from the video booths, as well as increased lighting and an unobstructed view of the booth from the sales clerk's station. See for instance Wall Distributors Inc. v. City of Newport News, 782 F.2d 1165 (4th Cir. 1986); Bamon Corp. v. City of Dayton, 923 F.2d 470, 474 (6th Cir. 1991); Berg v. Health and Hospital Corp., 865 F.2d 797, 802 (1989); Movie & Video World v. Bd. of County Commiss., 723 F. Supp. 695, 703 (S.D. Fla. 1989); Doe v. City of Minneapolis, 693 F. Supp. 774, 780 (D.Minn. 1988). In any event, many alternatives are available which are less restrictive than preventing the sale of constitutionally protected expression for an entire year, and the lower court's findings otherwise are indefensible.

Petitioners do not contend that the free speech guarantees embodied in the Constitution of the United States shield them against any form of governmental regulation. Rather, petitioners recognize that the occurrence of criminal sexual misconduct totally unrelated to the dissemination of constitutionally protected expression may provide the basis for closure of an adult bookstore, or any other place at which First Amendment or other protected activities occur, pursuant to a state nuisance statute without offending the Constitution of the United States. Importantly, however, the decision in Arcara did not address whether a First Amendment analysis would be applicable to a situation such as this, where the viewing of constitutionally protected expression was inextricably intertwined with the patron conduct deemed opprobrious. Thus, since the

viewing of constitutionally protected expression, unlike Arcara, was inextricably intertwined with the patron conduct herein deemed opprobrious, petitioners assert the full panoply of free speech protections are applicable.

As such, petitioners contend the analysis required by the Court's holding in O'Brien should be applied to this situation and that the statute's application to the Lions Den and others similarly situated should be held unconstitutional.

CONCLUSION

Based upon all of the foregoing, petitioners respectfully urge this Court to accept this case for review.

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THE SUPREME COURT OF OHIO

1993 TERM

To wit: October 20, 1993

STATE OF OHIO, ex rel. Richard G. Ward, Prosecuting Attorney for Ross County, Appellee,	:	Case No. 93-1556
v.	:	E N T R Y
Lions Den	:	
Midwest Pride V., Inc. et al., Appellants.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Ross County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Berkman, Gordon, Murray, Palda & DeVan.

(Court of Appeals No. 1874)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO, ex rel. Robert L. Becker, Prosecuting Attorney for Licking County	:
Plaintiff-Appellee	: Case No. 1874
v.	: DECISION AND JUDGMENT ENTRY
LIONS DEN ADULT BOOK STORE, et al.;	: (Filed June 4, 1993)
Defendants-Appellants	:

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ROSS, 1874

ABELE, J.

This is an appeal from a judgment entered by the Ross County Court of Common Pleas finding the existence of a nuisance at the premises of the Lions Den Bookstore and enjoining the owners and operators thereof, defendants below and appellants herein, from operating the bookstore for a period of one year.

Appellants assign the following errors:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN UPHOLDING THE CONSTITUTIONALITY OF CHAPTER 3767 AS APPLIED TO THIS CASE AND IN GRANTING RELIEF IN THE FORM OF THE CLOSURE OF A PRIVATE BOOKSTORE AND ARCADE, WHERE THE ONLY EVIDENCE INTRODUCED AGAINST APPELLANTS WAS THAT IN RESPONSE TO VIEWING NONOBSCENE, CONSTITUTIONALLY PROTECTED MATERIALS EXHIBITED IN PRIVATE BOOTHS IN THE ARCADE AREA OF THE CLUB, SOME MEMBERS ENGAGED IN MASTURBATION."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT AND IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR,

WHERE THE ONLY EVIDENCE INTRODUCED AGAINST APPELLANTS, THAT A SMALL PERCENTAGE OF MEMBERS ACTED IN A MANNER CONTRARY TO THE CLUB'S RULES AND POLICIES, WAS INSUFFICIENT, AS A MATTER OF LAW, TO IMPOSE LIABILITY ON APPELLANTS UNDER CHAPTER 3767."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED FROM THE INTERIOR OF A PRIVATE CLUB, THE LIONS DEN ADULT BOOKSTORE, WHERE THAT EVIDENCE WAS SEIZED, WITHOUT A PARTICULARIZED WARRANT ISSUED UPON PROBABLE CAUSE, BY UNDERCOVER OFFICERS WHO ACTED OVER AN EXTENDED PERIOD OF TIME WITH AN INVESTIGATORY PURPOSE AND NOT AS MEMBERS WOULD BE EXPECTED TO ACT."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN CLOSING THE BOOKSTORE FOR ANY PURPOSE AT THE TEMPORARY INJUNCTION STAGE OF THE PROCEEDINGS."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN FAILING TO DISMISS THE COMPLAINT AND IN REFUSING TO ENTER JUDGMENT IN APPELLANTS' FAVOR ON THE GROUND THAT THE DEFINITIONAL AND LIABILITY PROVISIONS OF CHAPTER 3767 ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION."

The Lions Den is a bookstore that sells sexually oriented videos, films, books, magazines, and novelties. The Lions Den also provides private booths for viewing sexually oriented films and videos. In January 1991, undercover officers from the Ross County Sheriff's Department and the Southcentral Ohio Task Force initiated an eleven month investigation into the Lions Den.

Posing as customers, the officers repeatedly entered the bookstore and the private viewing booths. The officers discovered holes existing in two of the walls separating adjacent viewing booths. On four occasions, Officer Randall Bliss observed patrons masturbating and inserting their erect penises into these holes. Also through these holes, Detective James Lowe observed, on nine occasions, patrons mas-

turbating while inside the booths. He also observed patrons inserting their penises through the holes, an individual press his bare buttocks against the hole, and another individual take his clothes off, place his mouth on the hole and rub the hole with his tongue.

Both officers observed stains on the floor, benches, walls, and on the video screens. The officers gathered soiled tissues and handkerchiefs from the premises and took samples of the substance or substances staining the walls. Chemical analysis indicated the presence of semen on the samples.

On November 27, 1991, appellee applied to the Ross County Court of Common Pleas for a temporary injunction and ex parte restraining order. The court granted appellee's requests. The court further or-

dered the Ross County Sheriff to make an inventory of the personal property and contents of the Lions Den, and to photograph and scientifically analyze those items that constituted essential evidence in the nuisance action.

The court held hearings on December 27, 1991 and January 9, 1992 regarding the temporary restraining order. On February 21, 1992, the court issued a temporary injunction enjoining appellants "from conducting, maintaining, using, occupying or in any way permitting the use of the entire premises known as The Lion's Den***." After conducting a hearing on April 8, 1992, the court granted appellee's request for a permanent injunction. The court ordered that the nuisance be abated and permanently enjoined and that the premises be closed for

use for any purpose and remain closed for a period of one year from April 8, 1992.

Appellants filed a timely notice of appeal.

I

In their first assignment of error, appellants argue that because the regulated conduct, masturbation, is so closely intertwined with protected speech, the First Amendment of the United States Constitution requires the trial court to employ the least intrusive restrictions. Appellant asserts the trial court failed to employ the least intrusive restrictions in this case. Appellee counters that the First Amendment does not apply to this case as masturbation is not expressive conduct.

Appellants maintain the least restrictive test of United States v. O'Brien (1968), 391 U.S. 367, 88 S.Ct. 1673, 20

L.Ed.2d 672, is applicable to the case at bar. In O'Brien, the United States Supreme Court created a four-part test to be used where "'speech' and 'nonspeech' elements combined in the same course of conduct." Id., 391 U.S. at 376-77, 88 S.Ct. at 1678-79, 20 L.Ed.2d at 679-80. In Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697, 106 S.Ct. 3172, 92 L.Ed.2d 568, a case similar to the case sub judice, the United States Supreme Court distinguished the conduct considered by the court in O'Brien, the burning of a draft card, from the conduct under consideration in Arcara. The Arcara court held that the conduct in that case, masturbation, fondling, fellatio, and solicitation of prostitution, "manifest[ed] absolutely no element of protected expression." Arcara, 478 U.S. at 704, 106 S.Ct. at 3176, 92 L.Ed.2d at 577. The court de-

clined to apply the O'Brien least restrictive means test, holding the closure of the adult bookstore and video arcade to be constitutional. Arcara, 478 U.S. at 707, 106 S.Ct. at 3177-78, 92 L.Ed.2d at 578.

We reject appellants' assertion that masturbating while viewing adult videotapes and movies manifests an element of protected expression. See, Arcara. Masturbation is not so inextricably bound up with the display of adult videotapes and movies that the conduct cannot be regulated separately from the protected speech. As noted by the Arcara court, appellants "remain free to sell the same materials at another location," Id., 478 U.S. at 705, 106 S.Ct. at 3177, 92 L.Ed.2d at 577, or at the same location at the end of one year.

Because we hold that the O'Brien test does not apply to the case sub judice, we

need not address appellants' argument that the trial court failed to apply the least restrictive means available to control the regulated conduct. Assuming, arguendo, that the O'Brien test is applicable, we would find no error. Appellants argue the trial court did not need to close the entire bookstore in order to eliminate the nuisance. Appellee asserts that because the retail area where books, videos, movies and sexually oriented paraphernalia were sold and the arcade area (the place where the "lewd" conduct occurred) are not separable areas, the trial court had no choice but to close the entire operation. The trial court noted that this enterprise consisted of "one operating entity, one business, located in the building."

When reviewing evidence presented at trial, an appellate court must not re-weigh

the evidence. An appellate court should not substitute its judgment for that of the trial court when there exists competent, credible evidence going to all the essential elements of the case. In Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 10 OBR 408, 410, 416 N.E. 2d 1273, 1276, the court wrote:

> "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial court is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony."

After a review of the record, we find competent, credible evidence to support the trial court's finding that the two areas of appellants' establishment, the bookstore area and the arcade area, were not adequately separated to allow the bookstore to

remain open without the risk of continuing lewd conduct. We note the facts in the case sub judice are similar to the facts in State, ex rel. Miller v. Rear Door Bookstore (1992), 63 Ohio St.3d 354, 588 N.E.2d 116, where the Supreme Court adopted the Franklin County Court of Appeals opinion in toto.[1] That opinion provides in pertinent part:

> "The evidence indicates that the operation was run as one unit. Patrons of the booth area had to first purchase tokens from the attendant in the retail area. If we treated the premises as separate units, we would be handling it differently from the way that it was operated. We further note that the United States Supreme Court in Arcara, supra, permitted the closure of the entire bookstore area. The court reasoned that, since the owners were free to sell their

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[1] We note the Ohio Supreme Court decided the Rear Door Bookstore case on April 8, 1992, the same day the court below held its final hearing in the case sub judice.

> books at another location, no First Amendment right had been abridged. ***"
>
> (Emphasis added.)

Id., 63 Ohio St.3d at 364-65, 588 N.E.2d at 125.

Accordingly, based upon the foregoing reasons, we overrule appellants' first assignment of error.

II

In their second assignment of error, appellants assert that: (1) appellants' customers' conduct did not constitute "lewdness" as that term is used in R.C. 3767.01, et seq., and (2) the fact that some customers behaved lewdly does not impose liability on appellants as a matter of law.

In Rear Door Bookstore, supra, the Ohio Supreme Court adopted the definition of "lewdness" as this term is used in R.C.

3767.01, et seq.[2] The Franklin County Court of Appeals' opinion, adopted by the Ohio Supreme Court, provides in pertinent part:

> "The terms 'lewdness' and 'assignation' are not legal terms of art but words of common usage. Webster defines 'lewd' as "'*** sexually unchaste or licentious *** lascivious *** inciting to sensual

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[2] R.C. 3767.01(C) states:

'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post office department.

desire or imagination ***.' Webster's Third New International Dictionary (1986) 1301. The Oxford English Dictionary gives a similar definition and cites Chaucer for first using the word in popular literature as early as 1386. 'Lascivious' is defined by Webster as: '*** inclined to lechery: lewd, lustful *** tending to arouse sexual desire ***.' Webster's, supra, at 1274. The Oxford Dictionary defines 'lascivious' as: '[i]nclined to lust, lewd, wanton.' The Oxford English Dictionary (1989) 666.

* * *

Appellants argue that the dictionary definitions of 'lewdness' are nothing more than a string of synonyms that add little to establishing a clear meaning for the term. While there may be some truth in appellants' argument when considered in a vacuum, the argument fails when the commonly accepted definitions of the words are considered in conjunction with the specific activities in this case and the discussion in controlling cases. The end result is that a meaning can be ascertained which puts a person of ordinary intelligence on notice of what actions are prohibited.

* * *

In summary, we conclude that the term 'lewdness' is not void for vagueness. The word describes a public sexual activity that is rep-

> rehensible or disgusting in nature. Its meaning is sufficiently clear to a person of average intelligence and its definition supplies ample guidance to prevent arbitrary and discriminatory enforcement."

Id., 63 Ohio St.3d at 358-59, 588 N.E.2d at 121.

When reviewing evidence presented at trial, an appellate court must not re-weigh the evidence. In C.E. Morris v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus, the Ohio Supreme Court held:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

See, also, Vogel v. Wells (1991), 57 Ohio St.3d 91, 566 N.E.2d 154; Ross v. Ross (1980), 64 Ohio St.2d 203, 18 O.O.3d 414, 414 N.E.2d 426.

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In Rear Door Bookstore, the evidence suggested that male masturbation and sexual intercourse between a male and a female had occurred on the subject premises. The court concluded that sufficient evidence existed to prove the occurrence of lewd behavior.

The evidence of the acts of masturbation and intercourse was more circumstantial in Rear Door Bookstore than in the case sub judice. In Rear Door Bookstore the Franklin County Court of Appeals described the evidence as follows:

> "On numerous occasions, the deputies retrieved used tissue paper from the floor and wastebaskets of the booths and, on at least two occasions, collected used condoms. Expert testimony was that there was semen on the tissues, and the testing of the condoms showed traces of both semen and epithelial cells indicative of their use during an act of sexual intercourse between a male and female. At one point in the investigation, the

> booths were observed with the aid of a blacklight which showed semen traces on the walls, seats, ceilings and doors of the booths. On one occasion, detectives observed two male patrons in booths with the doors to both booths open. As the detectives passed these booths, the men exited and entered booths next to the booths taken by the detectives.
>
> The detectives further reported the strong smell of urine present during one visit. Further testimony indicated that some of the booths had small 'peep holes' drilled in the walls separating adjacent booths. These holes appeared to have been puttied over and later redrilled.
>
> There was no evidence that the deputies had actually witnessed any sexual act and there are no allegations of obscenity regarding the videos shown in the booths."

Id., 63 Ohio St.3d at 356, 588 N.E.2d at 119.

In the case sub judice, the evidence includes the actual observations by the police officers of customers masturbating and inserting their penises in the holes

between the video booths. Tissues taken from the booths contained semen. We agree with the trial court's finding that lewdness has occurred on appellants' premises. We conclude that that trial court's judgment is supported by competent, credible evidence.

Appellants next argue that even if the customers' acts are considered lewd, appellants, as owners and operators of the adult bookstore and video arcade, cannot be held liable for the acts of their customers. In Rear Door Bookstore, the Franklin County Court of Appeals found ample evidence to support the trial court's finding that the appellants knew about the sexual activity occurring on their premises. Similarly, in the case sub judice, we find ample evidence to support the trial court's finding that

appellants knew about the lewd behavior occurring on their premises.

The investigating officers testified that through the holes in the walls between the video booths, they observed various customers masturbating and inserting their erect penises through the holes. The analysis of several tissues found on the floor and the samples of a substance removed from the walls indicated the presence of semen. In addition, the officers retrieved a used condom from the floor. As the trial court stated in the hearing on the permanent injunction:

> "[t]hat notwithstanding any published policies, the people who operated the business were perfectly aware, could not have been unaware, were not unaware of the activities which were going on in the arcade area. It's inconceivable to this Court, considering the evidence presented, that that could be the case."

See, Rear Door Bookstore, 63 Ohio St.3d at 363, 588 N.E.2d at 124; State ex rel. Lions Den Adult Bookstore (June 15, 1992), Licking App. No. 92-CA-16, unreported at 6.

We note the evidence presented in the case sub judice is more substantial and more compelling than the evidence presented in Rear Door Bookstore where the court found the owners and operators knew of the activity occurring within the bookstore. We must defer to the trial court's findings on questions of fact. A review of the record supports the trial court's conclusion that appellants had knowledge of the acts of their customers.

Accordingly, for the foregoing reasons, we overrule appellants' second assignment of error.

III

In their third assignment of error, appellants assert the seizure of evidence prior to the issuance of the temporary injunction constituted an unlawful warrantless seizure. Appellants also assert that the seizure of items pursuant to the restraining order constituted an unlawful seizure.

In Rear Door Bookstore, supra, the court held the search was lawful under two doctrines: (1) the bookstore owners and operators had no expectation of privacy in the discarded items seized by the police; and (2) the items were in plain view and thus were not protected from seizure by the Fourth Amendment. The court stated:

> "The Fourth Amendment applies to searches and seizures. '*** A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is in-

fringed. ***' United States v. Jacobsen (1984), 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85, 94. In the present case, the undercover deputies entered a part of appellants' place of business that was open to any adult member of the public. In that situation, there can be no expectation of privacy on appellants' part and, therefore, a search in the constitutional sense did not occur. Maryland v. Macon (1985), 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370.

This same conclusion can be reached by applying the plain-view doctrine. Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564. Since no First Amendment rights attached to the video booth activity, the plain-view doctrine was free of the constraints the Supreme Court has associated with freedom of speech and searches and seizures. Heller v. New York (1973), 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745. The evidence found was within the plain view of anyone who entered the arcade area of the bookstore. The bookstore was a place open to the public and, therefore, the deputies made their observations from a place where they were legally permitted to be."

Id., 63 Ohio St.3d at 364, 588 N.E.2d at 125-25.

In the case sub judice, the items seized prior to the issuance of the restraining order (waste tissues, a used condom, and a scraping from the wall) were of the same type as those items also seized without a warrant in Rear Door Bookstore. As the court stated in Rear Door Bookstore, these items were customer refuse in which appellants have no reasonable expectation of privacy, and therefore, the Fourth Amendment does not protect against seizure of these items. The police officers lawfully seized them without a warrant. Rear Door Bookstore, 63 Ohio St.3d at 364, 588 N.E.2d at 125.25. See, also, California v. Greenwood (1988), 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30; Maryland v. Macon

(1985), 472 U.S. 4631, 105 S.Ct. 2778, 86 L.Ed.2d 370.

Additionally, the seized items were in a location where a police officer had a lawful right to be as a member of the public, it was immediately apparent to the executing officers that the items were incriminating, and the discovery of the items was inadvertent. Thus, the police officers could lawfully seize the items under the plain-view doctrine. State v. Benner (1988), 40 Ohio St.3d 301, 307-08, 533 N.E.2d 701, 709, certiorari denied (1990), 494 U.S. 1090, 110 S.Ct. 1834, 108 L.Ed.2d 962. See, also, Horton v. California (1990), 110 S.Ct. 2301; Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022; Rear Door Bookstore, 63 Ohio St.3d at 364, 588 N.E.2d at 125.25.

Appellants argue that the items seized after the trial court issued the restraining order were also illegally seized because the restraining order "was for all intents and purposes a general warrant which did not issue upon probable cause ***."

R.C. 3767.04 allows a trial court to issue an ex parte restraining order upon the filing of a verified petition alleging the facts constituting a nuisance.[3]

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[3] R.C. 3767.04 states in pertinent part:

The action, provided in section 3767.03 of the Revised Code, shall be brought in the court of common pleas of the county in which the property is located. At the commencement of the action a verified petition alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

After the filing of the petition, application for a temporary injunction may be made to the court or a judge thereof who shall grant a hearing within ten days after

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The restraining order issued by the trial court states in pertinent part:

> "It is further ORDERED that the Ross County Sheriff shall forthwith make and return into this Court an inventory of the personal property and contents situated in and used in conducting and maintaining the premises named herein.
>
> The Court further ORDERS the contents of the premises that constitute essential evidence of the alleged nuisance be photographed and/or scientifically tested."

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the filing. Where such application for a temporary injunction is made, the court or judge thereof may, on application of the complainant, issue an ex parte restraining order, restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist until the decision of the court or judge granting or refusing such temporary injunction and until the further order of the court thereon. *** The officer serving such restraining order shall forthwith make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining such nuisance.

We note the court issued the restraining order pursuant to the statute and the officers seized only those items that were authorized by the restraining order, i.e., those that constituted essential evidence of the alleged nuisance. We find the post-restraining order seizure was lawful. Appellants' assertion in this regard is without merit.

Accordingly, based upon the foregoing reasons, we overrule appellants' third assignment of error.

IV

In their fourth assignment of error, appellants assert the closure of the bookstore for all purposes was too broad a remedy to issue at the temporary injunction stage. Appellee counters that the only method of temporarily preventing "lewdness, assignation, or prostitution" on the prem-

ises as required by R.C. 3767.04 was to close the entire bookstore.

If the owner or operator of the subject premises has received notice of the application for an injunction, R.C. 3767.04 provides that "the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction.[4]

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[4] R.C. 3767.04 provides in pertinent part:

A copy of the complaint, together with a notice of the time and place of the hearing of the application for a temporary injunction, shall be served upon the defendant at least five days before such hearing. If the hearing is then continued at the instance of any defendant, the temporary writ as prayed shall be granted as a matter of course. If upon hearing the allegations of the petition are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the

As we noted above, judgments supported by competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evi-

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defendant and any other person from continuing the nuisance. If at the time of granting a temporary injunction, it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless such person shows to the satisfaction of the court or judge that the nuisance complained if is abated, or that such person proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge shall forthwith issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until final decision is rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period of time the restraining order above provided if already issued, or, if not so issued, shall include such an order restraining for such period the removal or interference with the personal property and contents located therein. Such restraining order shall be served and the inventory of such property shall be made and filed as provided in this section. ***

dence. Seasons Coal Co. v. Cleveland 1984), 10 Ohio St.3d 77, 10 OBR 408, 461 N.E.2d 1273. An appellate court shall not substitute its judgment for that of the trial court when reviewing evidence.

As we discussed under appellants' first assignment of error, we find ample competent, credible evidence to support the trial court's finding that the two areas of appellants' bookstore and arcade were not adequately separated to eliminate the lewd conduct. The complete closure of the bookstore for all purposes was an appropriate remedy at the temporary injunction stage.

Accordingly, based upon the foregoing reasons, we overrule appellants' fourth assignment of error.

V

In their final assignment of error, appellants assert "the definitional and

liability provisions of Chapter 3767 are unconstitutionally vague and overbroad," especially as applied to the case at bar.

Appellants acknowledge that the Ohio Supreme Court has expressly ruled these statutory provisions are both constitutional on their face and constitutional as applied to the facts of the instant case. See State ex rel. Miller v. Rear Door Bookstore (1992), 63 Ohio St.3d 354, 588 N.E.2d 116. As an intermediate appellate court, we are obligated to follow decisions of the Ohio Supreme Court.

Accordingly, based upon the foregoing reasons, we overrule appellants' fifth assignment of error.

JUDGMENT AFFIRMED

GREY, J., CONCURRING IN PART AND DISSENTING IN PART:

I respectfully concur in part and dissent in part.

I would sustain assignment of error four because the relief granted was overly broad and far beyond what was needed to abate the nuisance.

It is well established that a person cannot be found guilty of maintaining a nuisance unless it can be shown that there is some degree of culpability on the part of the person against whom the injunction is brought. See, e.g., the discussion in State ex rel. Pizza v. Tom S.A., Inc. (1981), 68 Ohio Misc. 19, where it was held that you could not enjoin a promoter simply because some people took drugs at his rock concert. In Arcara, supra, the testimony

was that the masturbation and fellatio went on within the observation of the proprietor.

It is also well established that even if culpability can be shown, the breadth of the injunction must be limited only to those steps necessary to eliminate the nuisance. In Franklinton Coalition v. Open Shelter, Inc. (1983), 13 Ohio App.3d 399, the Tenth District Court of Appeals held that while the prior operation of a shelter might have been a nuisance, changes made in the operation which would abate the nuisance would be adequate instead of a complete shutdown of the facility.

In this case, according to the testimony of the police officers, there was a bookstore sales area which was connected to the viewing booth area. Entrance to the

booth area was through an opening described by the officer as a large doorway. He also said that the entrance was marked with signs telling customers that they were not permitted to bring sales items, like condoms, into that area. In Rear Door Bookstore, supra, without describing the actual layout, it was found that the place operated as one unit. In the case here, the nuisance could have been eliminated by simply ordering that the booths be torn out and the doorway opening to that area be sealed off. Closing the bookstore was excessive and far beyond what was needed to eliminate the nuisance.

The use of nuisance laws to suppress constitutionally protected activity is a particularly dangerous kind of activity. I can imagine a religious bookstore with a

back room where the patrons pray and burn candles and where the burning of the candles is considered to be a fire hazard. Clearly, the hazardous conduct could be enjoined, but to shut down the entire religious bookstore operation would be excessive when the problem could be eliminated by closing off the back room.

I am well aware that many people draw a distinction between the desirability of dirty bookstores and religious bookstores, but it is a distinction without a difference. If we live in a society where the government has the power to suppress one kind of bookstore, it has the power to suppress any kind of bookstore.

This is not a theoretical, academic observation. I see a tendency to suppress legitimate expression and exercise of reli-

gious beliefs along with the suppression of erotic expression and sexual practices. They are two sides of the same coin, and I would hold that, constitutionally speaking, it is a counterfeit coin which should not be circulated in our society.

Thus, I dissent in part.

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JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellants costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

Stephenson, J.: Concurs in Judgment & Opinion.
Grey, J.: Concurs in Part & Dissents in Part with Opinion.

For the Court,

By: /s/
Peter B. Abele, Judge

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NOTICE TO COUNSEL

Pursuant to Local Rule No. 11, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

STATE OF OHIO, EX REL.
RICHARD G. WARD,

Plaintiff — Case No. 91 CI 358

-vs- — JUDGE HOLMES

THE LION'S DEN, ET AL., — (Filed April 16, 1992)

Defendants

AMENDED
JUDGMENT ENTRY

This cause came on for hearing upon Plaintiff's Complaint requesting that Defendants be permanently enjoined from conducting, maintaining, using, occupying or in any way permitting the use of the premises at 3216 South Bridge Street, Chillicothe, Ross County, Ohio, as a public nuisance and that said nuisance be permanently abated.

The Court finds the existence of a nuisance at such premises and hereby **ORDERS**

that the nuisance be abated and permanently enjoined and that the premises be closed for use for any purpose and remain closed for a period of one (1) year from April 8, 1992.

The findings of fact and conclusions of law previously entered herein by Journal Entry dated February 21, 1992, are hereby reaffirmed as if fully rewritten with the following additions and modifications:

a. The Court finds that Michelle Robinette Moran to be an owner of the real property located at 3216 South Bridge Street, Chillicothe, Ohio, upon which The Lion's Den operated.

b. The Court finds that the operators of The Lion's Den could not have been unaware of the activities taking place upon The Lion's Den premises.

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio 43a

c. The Court finds closure to be the least restrictive remedy available in that The Lion's Den was one operating entity, one business, located in one building.

It is further **ORDERED** that a tax in the amount of Three Hundred Dollars ($300.00) be levied against each of the Defendants, Midwest Pride V, Inc., Michelle Robinette Moran and Frank E. Findo, for which a lien is granted in accordance with Ohio Revised Code Section 3767.09.

It is further **ORDERED** that Plaintiff's request for an order for the sale of furniture, fixtures and movable property used on The Lion's Den property in connection with the nuisance is denied for want of proof and all such property is hereby ordered released and the temporary restraining order previously ordered and extended herein is dissolved.

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

It is further **ORDERED** that Defendants pay the costs of these proceedings.

/s/ 4/15/92
NICHOLAS H. HOLMES, JR.
Judge, Court of Common Pleas, Ross County, Ohio

The Clerk of Courts is hereby directed to serve a copy of this Judgment Order, and its date of Entry upon the Journal, upon all counsel of record and all parties not represented by counsel, by personal service or by U.S. Mail, and to note service on the Docket.

Nicholas H. Holmes, Jr.
Judge

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio 45a

IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

STATE OF OHIO, EX REL.
RICHARD G. WARD,

Plaintiff — Case No. 91 CI 358

-vs- — JUDGE HOLMES

THE LION'S DEN, ET AL., — (Filed April 14, 1992)

Defendants

JUDGMENT ENTRY

This cause came on for hearing upon Plaintiff's Complaint requesting that Defendants be permanently enjoined from conducting, maintaining, using, occupying or in any way permitting the use of the premises at 3216 South Bridge Street, Chillicothe, Ross County, Ohio, as a public nuisance and that said nuisance be permanently abated.

The Court finds the existence of a nuisance at such premises and hereby **ORDERS**

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

that the nuisance be abated and permanently enjoined and that the premises be closed for use for any purpose and remain closed for a period of one (1) year from April 8, 1992.

The findings of fact and conclusions of law previously entered herein by Journal Entry dated February 21, 1992, are hereby reaffirmed as if fully rewritten with the following additions and modifications:

a. The Court finds Michelle Robinette Moran to be an owner of the real property located at 3216 South Bridge Street, Chillicothe, Ohio, upon which The Lion's Den operated.

b. The Court finds that the operators of The Lion's Den could not have been unaware of the activities taking place upon The Lion's Den premises.

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio 47a

c. The Court finds closure to be the least restrictive remedy available in that The Lion's Den was one operating entity, one business, located in one building.

It is further **ORDERED** that a tax in the amount of Three Hundred Dollars ($300.00) be levied against each of the Defendants, Midwest Pride V, Inc., Michelle Robinette Moran and Frank E. Findo, for which a lien is granted in accordance with Ohio Revised Code Section 3767.09.

It is further **ORDERED** that Plaintiff's request for an order for the sale of furniture, fixtures and movable property used on The Lion's Den property in connection with the nuisance is denied.

It is further **ORDERED** that Defendants pay the costs of these proceedings.

/s/
NICHOLAS H. HOLMES, JR.

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio 48a

Judge, Court of Common Pleas, Ross County, Ohio

The Clerk of Courts is hereby directed to serve a copy of this Judgment Order, and its date of Entry upon the Journal, upon all counsel of record and all parties not represented by counsel, by personal service or by U.S. Mail, and to note service on the Docket.

Nicholas H. Holmes, Jr.
Judge

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

STATE OF OHIO, EX REL.
RICHARD G. WARD,

Plaintiff — Case No. 91 CI 358

-vs- — JUDGE HOLMES

THE LION'S DEN, ET AL., — (Filed February 25, 1992)

Defendants

JOURNAL ENTRY

This matter came on to be heard on the motion of the Defendant to suppress evidence seized by law enforcement personnel from the premises known as The Lion's Den both prior to the time of issuance by this Court of a temporary restraining order against said business and subsequent thereto resulting from the execution of the temporary restraining order.

With respect to the observations made by law enforcement officers prior to the

issuance of a temporary restraining order in this case, it appears that all such observations would fall within the "plain view" doctrine and that the officers were lawfully on the premises and under no constitutional restraint from observing whatever was available for viewing. In addition, and considering the application of the Fourth Amendment to the Constitution of the United States to the items taken during visits by law enforcement officers to the business establishment known as The Lion's Den, no evidence was presented to this Court indicating that the property taken belonged either to The Lion's Den or its owners, but rather that such property in all likelihood belonged to several of the clientele of that facility. As such, the Defendants had no proprietary interest in the seized materials and no standing for

objection to its seizure. Moreover, the operators of this business have no reasonable expectation of privacy as it relates to basically patron refuse.

With respect to the seizure of property and searches made during the execution of this Court's temporary restraining order, the entrance into this business establishment is anticipated and in fact required under the circumstances pursuant to the mandates of R.C. 3767.04. It is required that an inventory be conducted of the personal property and the contents of the premises which were used in the conduct of the nuisance. Evidence seized during the conduct of a lawful inventory search and photographs taken concommitant [sic] therewith are encompassed within the concept of such inventory.

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio 52a

For the above reasons, the motion of the Defendants to suppress the searches and seizures made in this cause is overruled.

/s/
NICHOLAS H. HOLMES, JR.
Judge, Court of Common Pleas, Ross County, Ohio

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

State of Ohio, ex rel,
etc.

Plaintiffs

Case No. 91 CI 358

-vs-

JOURNAL ENTRY

The Lion's Den, et al.,

(Filed February 21, 1992)

Defendants

This matter came on for hearing on December 4, 1991 and January 9, 1992 upon the application for a preliminary injunction. Upon conclusion of the evidentiary proceedings, the parties filed written arguments and briefs in support of their positions thereto. The Court now makes the following findings of fact, by clear and convincing evidence and conclusions of law.

FINDINGS OF FACT:

1) Defendant Lion's Den is an adult bookstore located at 3216 S. Bridge Street, Chillicothe, Ohio. The store began oper-

ating in Ross County in 1987. This store stocks and sells videos, films, books, magazines and novelties, generally of a sexually oriented nature and provides private areas for viewing films and videos of a sexually oriented nature (arcade).

2) Defendant Lion's Den is owned and operated by defendants Midwest Pride V, Inc., and Frank E. Findo. The store's operation began in 1987.

3) Admission to all areas of the store is controlled by a cashier and/or manager located at the entry to the premises and within the retail area of the store. The retail and private viewing (arcade) areas are openly contiguous with each other and are not separated from each other.

4) The arcade area is comprised of approximately ten (10) private viewing booths and two (2) preview booths. Each private viewing booth has a door with a

lock, a seat for one patron, and coin activated viewing equipment which allows a patron to view a segment of the video for each quarter deposited. The preview booths are similar to the private viewing booths but are not coin activated.

5) In January 1991, undercover officers from the Ross County Sheriff's Department and the Southcentral Ohio Task Force initiated an investigation into the Lion's Den. This investigation spanned 11 months.

6) Posing as customers, the officers would repeatedly enter the bookstore. After paying the required fees, the undercover officers would then enter the private viewing booths.

7) A hole existed in the wall separating the viewing booths 5 and 6, as well as in the wall separating viewing booths 7 and 8.

8) On four occasions, Officer Randall Bliss observed patrons masturbating and inserting their erect penises into the holes common to adjoining viewing booths.

9) Detective James Lowe observed, on nine occasions, patrons masturbating while inside the booths. He also observed patrons inserting their penises through the holes, an individual press his bare buttocks against the hole, and another individual take his clothes off, place his mouth on the hole and rub the hole with his tongue.

10) Both described observing apparent semen stains on the floor, benches, walls and video screens.

11) Officers also gathered soiled tissues, and handkerchiefs from the premises. Mrs. Margaret Solbey, a forensic scientist, conducted tests on the seized items and

concluded the tests indicated the presence of semen on these items.

12) Midwest Pride V, Inc. is named on the vendor's license for the store.

13) Frank Findo is named on a deed as the owner of the real estate at which the store is located.

14) Defendants Lion's Den, Findo and Midwest Pride V, Inc. were aware of the sexual activities described in Findings of Fact 8 and 9 herein or were reckless in that regard.

CONCLUSIONS OF LAW:

1) Any person guilty of maintaining a nuisance shll be enjoined as provided by statute. O.R.C. Section 3767.02.

2) The definition of nuisance includes any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued or exists. O.R.C. Section 3767.01(C).

3) Lewdness is a term of common usage with a meaning of its own separate and apart from prostitution. Lewdness describes a public sexual activity that is reprehensible or disgusting in nature. State ex rel. Miller v. Rear Door (1991) Franklin App. No. 90 AP 986. Its meaning is sufficiently clear to alert a person of ordinary intelligence of what actions are prohibited. The term lewdness is neither void for vagueness nor over broad in its definition.

4) This nuisance action was predicated upon sexual activity occurring on the bookstore premises. Such activity is not protected expression. Arcara v. Cloud Books, Inc. (1986), 478 U.S. 697. Elements of protected speech are not involved, and therefore, there is no unconstitutional infringement of free speech.

5) Chapter 3767 does not set forth a specific mental state for those who are guilty of maintaining a nuisance. If the statute is not construed a strict liability statute, the culpable mental state applicable would be no more than "recklessly." See R.C. Section 2901.21(B). State, ex rel. Miller v. Trabue Road Bookstore (December 24, 1991), Franklin App. 91 AR 770, (unreported).

6) The Lion's Den Bookstore is a place in which lewdness is conducted, permitted, continued or exists in violation of R.C. Section 3767.01 et seq.

7) The Lion's Den is a nuisance as that term is defined by Section 3767.01(C). The defendants are guilty of maintaining a nuisance and shall be enjoined.

8) It is Ordered that a temporary injunction be issued, and is herewith issued, enjoining defendants from conducting, main-

taining, using, occupying or in any way permitting the use of the entire premises known as The Lion's Den, located at 3216 S. Bridge Street, Chillicothe, Ohio.

9) It is the further Order that Defendant Lion's Den is ordered to be closed and the Sheriff of Ross County shall effect such closure.

10) It is further Ordered that the temporary restraining order previously entered herein continue in effect until further Order of the Court.

11) This cause is set for final hearing on plaintiff's application for permanent injunction on 8th day of April, 1992 at 8:30 A.M.

Exceptions to the defendants.

Until further Order of this Court.

/s/
NICHOLAS H. HOLMES, JR.
JUDGE, Common Pleas Court, Ross County, Ohio, Courtroom #2

IN THE COURT OF COMMON PLEAS
ROSS COUNTY, OHIO

STATE OF OHIO, EX REL.
RICHARD G. WARD,

Plaintiff — Case No. _____

-vs- — JUDGE HOLMES

THE LION'S DEN, ET AL., — (Filed November 27, 1991)

Defendants

RESTRAINING ORDER

Based upon the allegations contained in the verified Complaint filed by the Plaintiff, and pursuant to section 3767.04 of the Ohio Revised Code, this Court makes the following findings and orders:

The Court finds that immediate and irreparable injury will result to the Plaintiff if the personal property or contents of the premises at 3216 South Bride Street, Chillicothe, Ross County, Ohio, are altered, removed, or destroyed, as such items

are essential evidence of the alleged nuisances as they are stated in the verified Complaint.

The orders contained herein are granted without notice, as Chapter 3767 of the Ohio Revised Code is a special statutory proceeding in which notice of the ex parte restraining order is not required.

It is hereby ORDERED that neither the Defendants herein, nor any other person, shall remove or in any manner interfere with the personal property or contents of the named premises, all of which are located within Ross County, Ohio, until the decision of this Court granting or refusing Plaintiff's application for a temporary injunction, and until further order of this Court hereon.

It is further ORDERED that the Ross County Sheriff shall serve a certified copy

of this order with any person in charge of said premises as set forth herein, or residing therein, and shall post certified copies of this order in conspicuous places at or upon one or more of the principle doors or entrances to such places.

It is further ORDERED that the Ross County Sheriff shall forthwith make and return into this Court an inventory of the personal property and contents situated in and used in conducting and maintaining the premises named herein.

The Court further ORDERS the contents of the premises that constitute essential evidence of the alleged nuisance be photographed and/or scientifically tested.

WHILE THIS ORDER REMAINS IN FORCE, ANY VIOLATION OF THIS ORDER, OR MUTILATION OR

REMOVAL OF THIS ORDER, WHEN POSTED, IS IN CONTEMPT OF COURT.

/s/
Judge, Court of Common Pleas, Ross County, Ohio

APPROVED:

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

/s/
SCOTT W. NUSBAUM
Assistant Prosecuting Attorney
Ross County, Ohio

RICHARD G. WARD
Prosecuting Attorney
Ross County, Ohio

Ohio Revised Code
(Page's 1988)

§ 3767.01 Definitions.

As used in all sections of the Revised Code relating to nuisances:

(A) "Place" includes any building, erection, or place or any separate part or portion thereof or the ground itself;

(B) "Person" includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

(C) "Nuisance" means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in

negative or positive form designed for exhibition by projection on a screen are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.

Ohio Revised Code
(Page's 1988)

§ 3767.02 Nuisance.

Any person, who uses, occupies, establishes, or conducts a nuisance, or aids or abets therein, and the owner, agent, or lessee of any interest in any such nuisance together with the persons employed in or in control of any such nuisance by any such owner, agent, or lessee is guilty of maintaining a nuisance and shall be enjoined as provided in sections 3767.03 to 3767.06, inclusive, of the Revised Code.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.03 Abatement of nuisance; bond.

Whenever a nuisance exists, the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation in which the nuisance exists; the prosecuting attorney of the county in which the nuisance exists; or any person who is a citizen of the county in which the nuisance exists may bring an action in equity in the name of the state, upon the relation of the attorney general; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; the prosecuting attorney, or the person, to abate the nuisance and to perpetually enjoin the person maintaining the nuisance from further maintaining it. If an action is instituted under this section

by a person other than the prosecuting attorney; the village solicitor, city director of law, or other similar chief legal officer of the municipal corporation; or the attorney general, the complainant shall execute a bond in the sum of not less than five hundred dollars,to the defendant, with good and sufficient surety to be approved by the court or clerk of the court, to secure to the defendant any damages he may sustain and the reasonable attorney's fees he may incur in defending the action if the action is wrongfully brought, not prosecuted to final judgment, is dismissed, or is not maintained, or if it is finally decided that an injunction should not have been granted. If it is finally decided that an injunction should not have been granted or if the action was wrongfully brought, not prosecuted to final judgment, dismissed, or not maintained, the defendant

shall have recourse against the bond for all damages suffered, including damages to his property, person, or character, and for the reasonable attorney's fees incurred by him in defending the action.

Ohio Revised Code
(Page's 1992 Supp)

§ 3767.04 Procedure in injunction action.

(A) The civil action provided for in section 3767.03 of the Revised Code shall be commenced in the court of common pleas of the county in which the nuisance is located. At the commencement of the action, a complaint alleging the facts constituting the nuisance shall be filed in the office of the clerk of the court of common pleas.

(B)(1) After the filing of the complaint, an application for a temporary injunction may be filed with the court or a judge of the court. A hearing shall be held on the application within ten days after the filing.

(2) If an application for a temporary injunction is filed, the court or a judge of the court, on application of the complainant, may issue an ex parte restraining

order restraining the defendant and all other persons from removing or in any manner interfering with the personal property and contents of the place where the nuisance is alleged to exist until the decision of the court or judge granting or refusing the requested temporary injunction and until the further order of the court. The restraining order may be served by handing it to and leaving a copy of it with any person who is in charge of the place where the nuisance is alleged to exist or who resides in that place, by posting a copy of it in a conspicuous place at or upon one or more of the principal doors or entrances of that place, or by both delivery and posting. The officer serving the restraining order forthwith shall make and return into court an inventory of the personal property and contents situated in and used in conducting or maintaining the

nuisance. Any violation of the restraining order is a contempt of court, and, if the order is posted, its mutilation or removal while it remains in force is a contempt of court, provided the posted order contains a notice to that effect.

(3) A copy of the complaint, a copy of the application for the temporary injunction, and a notice of the time and place of the hearing on the application shall be served upon the defendant at least five days before the hearing. If the hearing then is continued on the motion of any defendant, the requested temporary injunction shall be granted as a matter of course. If, upon hearing, the allegations of the complaint are sustained to the satisfaction of the court or judge, the court or judge shall issue a temporary injunction without additional bond restraining the defendant and any other per-

son from continuing the nuisance. Except as provided in division (C) of this section, if at the time of granting the temporary injunction it further appears that the person owning, in control, or in charge of the nuisance so enjoined had received five days' notice of the hearing and unless that person shows to the satisfaction of the court or judge that the nuisance complained of is abated or that he proceeded forthwith to enforce his rights under section 3767.10 of the Revised Code, the court or judge forthwith shall issue an order closing the place against its use for any purpose of lewdness, assignation, or prostitution until a final decision is rendered on the complaint for the requested permanent injunction. Except as provided in division (C) of this section, the order closing the place also shall continue in effect for that further period any re-

straining order already issued under division (B)(2) of this section, or, if a restraining order was not so issued, the order closing the place shall include an order restraining for that further period the removal or interference with the personal property and contents located in the place. The order closing the place shall be served and an inventory of the personal property and contents situated in the place shall be made and filed as provided in division (B)(2) of this section for restraining orders.

(C) The owner of any real or personal property closed or to be closed or restrained may appear in the court of common pleas between the time of the filing of the complaint for the permanent injunction described in division (A) of this section and the hearing on the complaint, and, if all costs incurred are paid and if the

owner of the real property files a bond with sureties approved by the clerk, in the full value of the real property as ascertained by the court, or, in vacation, by the judge, and conditioned that the owner of the real property immediately will abate the nuisance and prevent it from being established or kept until the decision of the court or judge is rendered on the complaint for the permanent injunction, the court or judge in vacation, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of the personal property as a nuisance and that, with reasonable care and diligence, the owner of the personal property could not have known of its use as a nuisance, shall deliver the real or personal property, or both, to the respective owners and discharge or refrain

from issuing at the time of the hearing on the application for the temporary injunction any order closing the real property or restraining the removal or interference with the personal property. The release of any real or personal property, under this division shall not release it from any judgment, lien, penalty, or liability to which it may be subjected.

§ 3767.05 Priority of action; evidence; costs.

The action, provided for in sections 3767.03 and 3767.04 of the Revised Code, shall be set down for trial at the first term of the court and shall have precedence over all other cases except crimes, election contests, or injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the criminal laws against prostitution, lewdness, or assignation at any such place is admissible for the purpose of proving the existence of said nuisance and is prima-facie evidence of such nuisance and of knowledge of and of acquiescence and participation therein on the part of the person charged with maintaining said nuisance. If the complaint is

filed by a person who is a citizen of the county it shall not be dismissed except upon a sworn statement by the complainant and his attorney, setting forth the reason why the action should be dismissed and the dismissal approved by the prosecuting attorney in writing or in open court. If the judge is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute said action to judgment at the expense of the county, and if the action is continued more than one term of court, any person who is a citizen of the county, or has an office therein, or the attorney general or the prosecuting attorney, may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action,

the costs may be taxed to such person. If the existence of the nuisance is established upon the trial, a judgment shall be entered which shall perpetually enjoin the defendant and another person from further maintaining the nuisance at the place complained of and the defendant from maintaining such nuisance elsewhere.

§ 3767.06 Order of abatement; removal of personal property and contents; attorney general nuisance abatement fund.

(A) If the existence of a nuisance is admitted or established in the civil action provided for in section 3767.03 of the Revised Code, or in a criminal action, an order of abatement shall be included in the judgment entry under division (D) of section 3767.05 of the Revised Code. The order shall direct the removal from the place where the nuisance is found to exist of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in division (C) of section 3767.04 of the Revised Code and shall direct that the personal property or contents that belong to the defendants notified or appearing be sold, without appraisal, at a public

auction to the highest bidder for cash. The order also shall require the renewal for one year of any bond furnished by the owner of the real property under section 3767.04 of the Revised Code; if a bond was not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction; or, if a closing order was not then issued, shall include an order directing the effectual closing of the place where the nuisance is found to exist against its use for any purpose and keeping it closed for a period of one year unless sooner released. The owner of any place closed and not released under bond may appear and obtain a release in the manner and upon fulfilling the requirements provided in section 3767.04 of the Revised Code. The release of property under this division shall not release it from any judgment, lien,

penalty, or liability to which it may be subject.

(B) Owners of unsold personal property or contents seized pursuant to division (A) of this section shall appear and claim the personal property within ten days after the order of abatement is issued and prove to the satisfaction of the court their lack of any actual knowledge of the use of the personal property or contents in the conduct or maintenance of the nuisance and that with reasonable care and diligence they could not have known of that use. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place where the nuisance is found to exist. If an owner establishes the lack of actual or constructive knowledge of the use of his personal property or contents in the conduct or maintenance of the nuisance, the unsold

personal property or contents shall be sold or otherwise disposed of as provided in division (A) of this section. For removing and selling the personal property and contents, the officer involved shall be entitled to charge and receive the same fees as he would for levying upon and selling similar property on execution. For closing the place where the nuisance is found to exist and keeping it closed, a reasonable sum shall be allowed by the court.

(C) There is hereby established in the state treasury the attorney general nuisance fund. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, all proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted by the attorney general under sections 3767.03 to 3767.11 of the Revised Code shall be deposited into the

state treasury and credited to the fund. The attorney general shall use the fund solely to defray expenses and costs associated with those types of civil actions.

(D) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a village solicitor, city director of law, or other similar chief legal officer of a municipal corporation initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to

3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into the city or village treasury and credited to the general fund.

(E) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced or otherwise prosecuted under sections 3767.03 to 3767.11 of the Revised Code by a prosecuting attorney initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application

shall be deposited into the county treasury and credited to the general fund.

(F) All proceeds from the sale of personal property or contents seized pursuant to a civil action commenced under sections 3767.03 to 3767.11 of the Revised Code by a person who is a citizen of the county where the nuisance is found to exist initially shall be applied to the payment of the costs incurred in the prosecution of the civil action and the costs associated with the abatement and sale ordered pursuant to division (A) of this section, including, but not limited to, court costs, reasonable attorney's fees, and other litigation expenses incurred by the complainant. Except as otherwise provided in sections 3767.07 to 3767.11 of the Revised Code, any proceeds remaining after that initial application shall be deposited into

the county treasury and credited to the general fund.

CONSTITUTION OF THE UNITED STATES

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote an any election

for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a

member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such

debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Supreme Court, U.S.
FILED
FEB 15 1994
OFFICE OF THE CLERK

No. 93-1166

In The

Supreme Court of the United States

October Term, 1993

MIDWEST PRIDE V, INC.; MICHAEL F. MORAN; MICHELE MORAN; FRANK FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. RICHARD G. WARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD G. WARD
ROSS COUNTY PROSECUTING ATTORNEY
72 North Paint Street
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Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. WHETHER THE PATRONS OF AN ESTABLISHMENT THAT SELLS SEXUALLY ORIENTED VIDEOS, FILMS, BOOKS, MAGAZINES, NOVELTIES AND VARIOUS SEXUAL DEVISES AND ALSO PROVIDES AN ARCADE FOR THE VIEWING OF SUCH MATERIALS ARE ENGAGED IN CONDUCT WITH A SIGNIFICANT EXPRESSIVE ELEMENT WHEN THEY ENGAGE IN ACTS OF PUBLIC EXPOSURE OF PRIVATE PARTS OF THE ANATOMY, PUBLIC AND PRIVATE ACTS OF MASTURBATION AND ACTS OF SOLICITATION WHILE ON SUCH PREMISES THEREBY REQUIRING A FIRST AND FOURTEENTH AMENDMENT ANALYSIS OF THE APPLICATION OF A STATE NUISANCE LAW USED TO CLOSE THE PREMISE SOLELY BECAUSE OF THE MISCONDUCT OCCURRING ON THE PREMISES.

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No. 93-1166

In The

Supreme Court of the United States

October Term, 1993

MIDWEST PRIDE V, INC.; MICHAEL F. MORAN; MICHELE MORAN; FRANK FINDO,

Petitioners,

vs.

STATE OF OHIO, EX REL. RICHARD G. WARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On October 20, 1993, the Ohio Supreme Court declined to exercise its jurisdiction to review the decision of the Court of Appeals of Ohio, Fourth Appellate District, which is the basis of these proceedings. The Ohio Supreme Court ruled that the case involved no substantial constitutional question.

The proceedings below were commenced in accordance with the provision of Chapter 3767 of the Ohio Revised Code which provides a procedure for the closing of sexually oriented businesses if they are determined to

constitute public nuisances. Among other definitions that law defines a "nuisance" as a place in or upon which lewdness, assignation or prostitution is conducted, permitted or exists.

After a lengthy investigation of the Petitioners' premises in Ross County, Ohio, known as "The Lion's Den", the Ross County Prosecutor filed a verified complaint in the Common Pleas Court, alleging The Lion's Den was a public nuisance. Upon such filing an application for a temporary retraining order and an ex parte restraining order were filed as provided by the Ohio statutes. The Court directed the Ross County Sheriff to go to the premises and take an inventory of the premises constituting the alleged nuisance. In an effort to preserve evidence, the Court, in the temporary restraining order, permitted the taking of photographs of the premises as well as scientific testing to determine if The Lion's Den was a place in or upon which lewdness, assignation or prostitution was conducted, permitted, continued or existed.

On February 21, 1992, the Court issued a temporary injunction and on April 14, 1992, a permanent injunction. The trial court determined The Lion's Den to be a nuisance and that Petitioners were guilty of maintaining a nuisance. The Court further ruled that The Lion's Den should be closed for a period of one year.

On April 23, 1992, Petitioners filed a notice of appeal in the Fourth District Court of Appeals. On June 4, 1993, the Appellate Court affirmed the decision of the Ross County Court of Common Pleas.

Petitioners filed a Notice of Appeal to the Ohio Supreme Court on July 2, 1993, and on October 20, 1993,

the Ohio Supreme Court ruled that the case involved no substantial constitutional question and declined to accept jurisdiction.

STATEMENT OF FACTS

In their Petition, Petitioners misstate and mischaracterize the facts upon which the lower courts issued their decisions. Therefore Respondent sets forth the following factual summary.

In January of 1991, undercover officers from the Ross County Sheriff's Department and the South Central Ohio Task Force initiated an investigation of The Lion's Den. Undercover officers visited The Lion's Den on numerous occasions. In February of 1991, after the investigation had begun, there was an attempt to make The Lion's Den a "private club" by charging a single dollar for a membership. Even though membership was then required to enter, on at least one occasion an undercover detective entered the store without a membership card. One of the reasons for the change in membership policies was explained by a Lion's Den employee who thought that "the Sheriff's Department would have to notify them first before the Sheriff's Department entered and that the Sheriff would love to come in on them."

At trial an undercover officer described four (4) instances between January and September, 1991, when he entered The Lion's Den. He described his observations of the patrons of The Lion's Den masturbating and inserting their erect penises into holes common to adjoining viewing booths available on the premises. He described

observing apparent semen on the floor, benches and video screens. He also identified objects that he recovered from The Lion's Den that were taken to the State's forensic laboratory for analysis.

A forensic scientist testified that she examined the evidence seized at The Lion's Den for the presence of semen. She submitted the seized evidence to a "mapping" procedure to detect the presence or absence of semen and concluded that the tests indicated the presence of semen on the evidence submitted by the undercover officer.

Another officer testified concerning his observations on eleven (11) separate undercover visits to The Lion's Den. On nine (9) of those visits he observed The Lion's Den patrons in acts of masturbation. He also described the various activities he observed relating to the common holes between the viewing booths. The observed subjects inserting their penises through the holes; he observed an individual press his bare buttocks against the hole; and he observed another subject take his clothes off, place his mouth to the hole and rub the hole with his tongue. This officer also described an occasion when one of The Lion's Den patrons invited him to engage in sexual activity.

The same officer also described the apparent presence of semen, wet and dry, in various locations in The Lion's Den. Photographs, some aided by the use of a "black light," confirmed massive stains, spots and streaks of apparent semen throughout The Lion's Den premises.

During the evidentiary hearing Petitioners called only one witness, the Prosecuting Attorney. During this hearing the Petitioners did not introduce any evidence that contradicted any of the factual allegations made by

Respondent. The trial court concluded that the retail and arcade areas of the store were openly contiguous with each other and were not separated from each other. The trial court, in its Amended Judgment Entry, specifically concluded that the Lion's Den was one operating entity, one business, located in one building. (Amended Judgment Entry at p. 44a, Appendix, Petitioners' Brief) More specifically, the trial court in its Findings of Fact, determined that

> admission to all areas of the store is controlled by a cashier and/or manager located at the entry to the premises and within the retail area of the store. The retail and private viewing (arcade) areas are openly contiguous with each other and are not separated from each other.

The Court stated that

> this nuisance action was predicated upon sexual activity occurring on the bookstore premises. . . . Such activity is not protected expression and therefore there is no unconstitutional infringement of free speech.

The Lion's Den was then held to be a nuisance as defined by Section 3767.01(C) and was ordered closed for a period of one year.

ARGUMENT

The facts presented in these proceedings are almost identical to the facts presented to this Court in *Arcara vs. Cloud Books, Inc.*, 478 U.S. 697 (1986). The Petitioners in these proceedings operate "The Lion's Den," a business that sells sexually oriented materials, including videos,

books and other devices and also had available on the premises an arcade for the viewing of sexually explicit movies. No issue is presented as to whether the videos or books are obscene, pornographic materials.

In the course of a law enforcement investigation, undercover officers personally observed instances of masturbation and evidence of masturbation by patrons. Some of the video booths shared common holes between them, and the officers observed patrons inserting their penises through these holes into adjoining booths on multiple occasions. One officer was solicited by a patron to engage in sexual activity.

This Court, in *Arcara*, concluded that the conduct in that case, which is almost identical to the conduct in the instant case, "manifest[ed] absolutely no element of protected expression." *Arcara*, 478 U.S. at 704.

Petitioners claim that the patrons' acts of masturbation occurred while the patrons were viewing sexually explicit videos thereby intimately associating non-speech conduct (i.e. masturbation) with speech being disseminated on the premises. This view was specifically rejected by both the trial and appellate courts below. The trial court specifically held that the

> nuisance action was predicated upon sexual activity occurring on the bookstore premises. Such activity is not protected expression. . . . Elements of protected speech are not involved, and therefore there is unconstitutional infringement of free speech.

Similarly, the appellate court rejected the Petitioners' claims concluding that "the sexual activities which gave

rise to the nuisance complaint filed herein contain no element of protected expression," a view in accord with the United States Supreme Court holding in *Arcara vs. Cloud Books, Inc.*, 478 U.S. (1986). (Decision and Judgment Entry of Court of Appeals at p. 10a, Appendix, Petitioners' Brief).

Petitioners argue that because the sexual conduct regulated by the nuisance action is so closely intertwined with protected speech, the First Amendment of the United State Constitution required the trial court to employ the least restrictive test of *United States vs. O'Brien* (1968), 391 U.S. 367. In *O'Brien* this Court created a four-part test to be used where "speech" and "non-speech" elements combine in the same course of conduct. The trial court and the appellate court after finding that the regulated conduct in the instant case manifested absolutely no element of protected expression, concluded further that if the *O'Brien* test were to be applied, it was satisfied.

Petitioners grossly misstate the facts in their analysis of this issue. They predicate their "least restrictive" argument upon their factual statement that The Lion's Den business premises was "composed of two separate and identifiable areas." (Petitioners' Brief at page 21) In fact, the trial court found that the enterprise consisted of "one operating entity, one business, located in the building." (Judgment Entry at p. 44a, Appendix, Petitioners' Brief) The trial court found further that the two areas of the establishment were not adequately separated to permit the premises to remain open without the risk of the continuing sexual conduct.

In the proceedings below, the government was not regulating speech or conduct with a significant expressive element. Conceivably every governmental action can be construed to have some effect upon speech or expression. This Court clearly drew the line of First Amendment implication in *Arcara* when it reasoned that:

> It is true that the closure order in this case would require respondents to move their bookselling business to another location. Yet we have not traditionally subjected every criminal and civil sanction imposed through legal process to "least restrictive means" scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction. Rather, we have subjected such restrictions to scrutiny only where it was *conduct with a significant expressive element that drew the legal remedy in the first place*, as in *O'Brien*, or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity, as in *Minneapolis Star*. This case involves neither situation, and we conclude the First Amendment is not implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books. (Emphasis added.)

Even if the First Amendment were to be implicated, the trial court and the Court of Appeals considered the application of the *O'Brien* test and concluded that if the *O'Brien* test were to be applied, it was satisfied.

CONCLUSION

It is respectfully submitted that Petitioners have failed to establish any reason why the writ should be granted. The decision below did not involve questions of federal law which have not been, but should be, settled by this Court, nor did it decide a federal question in a way that conflicts with applicable decisions of this Court. It is respectfully submitted that the Petition for A Writ of Certiorari should be denied.

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